85-313

Supreme Court, U.S.
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NO.

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

GEORGE CAVROS,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTION PRESENTED FOR REVIEW

The question presented for review is:

(i) Is a trial court's comment to a jury intimating its belief in the guilt of the Defendant and suggesting that the jury be at a certain stage in its deliberations irreparably harmful?

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ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

TO: THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

The Petitioner GEORGE CAVROS, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, made and entered in this proceeding on June 25, 1985.

The citation of the Connecticut Supreme Court opinion is *State v. George Cavros,* 196 Conn. 519 (1985) (Appendix A).

A. THE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOLVED.

(i) The judgment or decree sought to be reviewed is the opinion of the Connecticut Supreme Court made and entered June 25, 1985.

(ii) A petition for rehearing was not filed.

(iii) The statutory provision believed to confer jurisdiction to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1257 (3).

B. CONSTITUTIONAL PROVISION, TREATIES, STATUTES, ORDINANCES AND REGULATIONS.

The Petitioner submits that actions of the trial court and affirmed by the Connecticut Supreme Court deprived him of his rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

C. STATEMENT OF THE CASE.

The Defendant, George Cavros, shot and killed a friend and frequent companion on December 4, 1980. The killing followed a fight at a bar in which the Defendant was struck by the victim. The Defendant, victim and friends had been drinking in the bar prior to the fight. A second fight occurred outside the bar and the Defendant was again struck by his friend. The Defendant was forced into his car by two men while the victim strained to reach him. The Defendant struggled from the car and fired the fatal shot.

The Defendant was indicted and tried by a jury of twelve on the charge of murder and four lesser included offenses. At trial, the Defendant did not deny killing his friend, but offered evidence that the act was done in self defense.

After the jury had been charged by the court, they were excused to begin deliberations. (Tr. pp. 614-615)[1]. After more than one hour of deliberation, the jury requested copies "of the court's definition of murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent homicide and self-defense". (Tr. p. 621). The court characterized the request as "premature" and noted that the jury's first function was to take up the charge of murder and consider the offenses in descending order. (Tr. p. 622). The court then indicated that it would reread its charge on murder exclusively, the next morning. (Tr. p. 623). In its comments, the court made reference to the crime of murder nine times (Tr. pp. 622-627), once referring to it as the "offense charged in the indictment". (Tr. p. 626). After the court read the jury's request into the record (Tr. p. 621), the court did not mention the lesser included offenses or self-defense again.

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[1] Pertinent parts of the transcript are reproduced in Appendix B.

The jury was then excused for the day at 5:25 p.m. (Tr. p. 627). Immediately after the jury was excused, defense counsel advised the court that he was troubled by the court's comments to the jury. (Tr. p. 628). The court discussed the jury's request with counsel and allowed until the next day for argument on the defendant's claim of error. (Tr. p. 628).

The next day, the Defendant, through counsel, moved the court to declare a mistrial. (Tr. p. 632). Argument was heard on the Defendant's motion (Tr. pp. 633-634), and the motion was denied. (Tr. p. 635). The Defendant took an exception to the court's ruling. (Tr. p. 635).

Before the court could begin its attempt to cure the prejudicial comments, the jury by way of a note stated, "we are withdrawing our earlier request for written testimony, please recharge us on murder including the definition of intent and self defense". (Tr. p. 637). The court inquired whether the jury's request was prompted by the court's comments on murder and the jury responded affirmatively. (Tr. p. 639). The court then attempted to cure the error and reread its charges as originally requested by the jury.

POINT I. THE CONNECTICUT SUPREME COURT OPINION VIOLATES THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

The trial court's comments implied that the court believed that the Defendant was guilty of murder. A juror who had decided that the act was done in self defense or that the act constituted a lesser included offense could have inferred from the court's comments that those determinations were erroneous. The trial court's intrusion into

the deliberative process was violative of the Defendant's rights to due process of law and a trial by jury.

There are few occasions where a court may intimate to the jury its opinion regarding the ultimate legal conclusion of the matter before them, but "(t)he decision of the issues of fact must be fairly left to the jury". *United States v. Murdock*, 270 U.S. 389, 394 (1933).

> (I)t is not a sufficient answer to say that a (Connecticut) judge has authority to comment on the evidence, or that the judge here stated that the jury could disregard his comments. . . . The comment here was more in the nature of a legal conclusion than a comment on the evidence, and the jury could have construed it as an instruction on the law which it was bound to follow. The court usurped the jury's function and virtually directed a verdict of guilty.

U.S. v. DeLaBarra, 447 F.2d 193 (5th Cir. 1971).

And, as this court has said, " '(t)he influence of the trial judge on the jury is necessarily and properly of great weight' and 'his lightest word or intimations is received with deference, and may prove controlling.' " *Quercia v. United States*, 289 U.S. 466, 470 (citations omitted) (1933). It is recognized that, "(t)he failure of the judge to cautiously exercise his right to comment may easily result in prejudice to a litigant's rights, particularly in a criminal case". *United States v. Dunmore*, 446 F.2d F.2d 1214, 1218 (8th Cir. 1971); *citing: Ray v. United States*, 367 F.2d 258 (8th Cir. 1966); *cert. denied*, 386 U.S. 913 (1967).

In this case, the adverse effect of the court's comments may have been exacerbated because of the time they were made. The comments were made after the jury had begun its deliberations and were preceded and followed by instructions on the law. They were made at the end of a day

and could not be addressed again until the next morning. The prejudicial comments of the trial judge constitute error of a constitutional magnitude. The intrusion into the exclusive province of the jury denied the Defendant of his rights to a fair and impartial trial by jury.

The exact effect of the prejudicial remarks cannot be accurately determined. However, that the effect is unknown does not mitigate the error. "(C)onstitutional error in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." *Chapman v. California*, 386 U.S. 18, 24 (1966). The State of Connecticut can only offer its speculations as to the effect of the error to try to meet that burden.

The trial court's subsequent remarks could not and did not cure the error. The instructions[2] did not advise the jury not to draw inferences from the comments. The jury was not told that their opinion was controlling and was not told, at that time, that the determination of the facts was their exclusive province. Also, the jury had many hours to privately reflect on the judge's suggestions before the attempt to cure the error was made.

Under the circumstances, the instructions given were insufficient to overcome the prejudicial remarks.

> It is well known, as a matter of judicial notice, that juries are highly sensitive to every utterance by the trial judge, the trial arbiter, and that some comments may be so highly prejudicial that even a strong admonition by the judge to the jury, that they are not bound by the judge's views, will not cure the error.

Bursten v. United States, 395 F.2d 976, 983 (5th Cir. 1969).

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[2]The remarks are contained in the trial transcript at pages 637-644 and reproduced in Appendix B.

CONCLUSION

The decision in this case violated the Defendant's Constitutional rights to a fair and impartial trial by jury and, therefore, decides a federal question in conflict with the applicable decisions of the United States Supreme Court.

Dated:

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF CONNECTICUT

STATE OF CONNECTICUT :

v. :

GEORGE CAVROS : NO. 11863

OPINION

SANTANIELLO, J. JUNE 25, 1985

APPEARANCES
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HERBERT APPLETON, Assistant State's Attorney,
CARL SCHUMAN, Assistant State's Attorney,
SUSANN E. GILL, Deputy Assistant State's Attorney

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SANTANIELLO, J. The defendant, George Cavros, was tried before a jury of twelve on an indictment for murder. The jury returned a verdict of guilty of the lesser included offense of manslaughter in the first degree under General Statutes § 53a-55 (a) (1), and the defendant was sentenced to a term of not less than ten nor more than twenty years imprisonment. The defendant appeals from

the judgment of conviction claiming error in the trial court's denial of his motion for a mistrial, grounded on certain allegedly prejudicial remarks made by the court to the jury. We find no error.

The facts and circumstances surrounding the offense are not in dispute. The defendant and the victim were friends. On the evening of December 4, 1980, they were drinking in a bar located on Union Place in Hartford with several of their social companions. A fight broke out during which the victim struck the defendant, breaking his glasses. The group then split up and the defendant left the bar unaccompanied.

Later that night, the defendant was driving along Union Place and saw the victim and three others. He stopped the car, got out and approached the group. Another fight took place and the victim again struck the defendant, resulting in the loss of a lens from the defendant's glasses. Two men restrained the defendant as the victim struggled to reach him. The men forced the defendant head first back into his car, where the defendant grabbed a gun, turned and fired, killing the victim. At trial, the defendant did not deny that he had shot and killed the victim, but claimed that the shooting was justified because he had acted in self-defense. See General Statutes § 53a-19.[1]

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[1] "[General Statutes] Sec. 53a-19. USE OF PHYSICAL FORCE IN DEFENSE OF PERSON. (a) Except as provided in subsections (b) and (c) a person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose: except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm.

(continued next page)

At trial, the jury was instructed on murder, self-defense, and the lesser included offenses of first and second degree manslaughter and criminally negligent homicide. The court specifically charged the jury to consider the proof with regard to each offense, beginning with the offense charged, murder, and, if that crime were not proved, then to move on to consider each of the lesser included offenses in descending order of seriousness. The court concluded its jury charge at 3:55 p.m. on October 26, 1982, and the jury retired to commence its deliberations. Later that afternoon, the court received a note from the jury, with the time notation of 4:50 p.m., in which the jury requested a "copy of the Court's definition" of murder, manslaughter in the first degree, manslaughter in the second degree, criminal negligence and self-defense, and the "[e]ntire testimony" of six witnesses. The court summoned the jury at 5:14 p.m. and stated that it was just about to excuse the jury for the day when it received the above request. The

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1 continued

"(b) Notwithstanding the provisions of subsection (a), a person is not justified in using deadly physical force upon another person if he knows that he can avoid the necessity of using such force with complete safety (1) by retreating, except that the actor shall not be required to retreat if he is in his dwelling, as defined in section 53a-100, or place of work and was not the initial aggressor, or if he is a peace officer or a private person assisting such peace officer at his direction, and acting pursuant to section 53a-22, or (2) by surrendering possession of property to a person asserting a claim of right thereto, or (3) by complying with a demand that he abstain from performing an act which he is not obliged to perform.

"(c) Notwithstanding the provisions of subsection (a), a person is not justified in using physical force when (1) with intent to cause physical injury or death to another person, he provokes the use of physical force by such other person, or (2) he is the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of physical force, or (3) the physical force involved was the product of a combat by agreement not specifically authorized by law."

court informed the jury that it had not "had full opportunity to discuss [the note] with counsel," and that while "portions of the Court's charge may be repeated and may be re-read to you . . . [u]nder our procedures the charge itself, or . . . the statutory basis for the charge is not before you in the jury room." During a colloquy with the jury foreman, the court repeated its earlier instruction "that the charge explained all of these offenses in descending order. And your first function under the Court's charge is to take up the charge of murder." Indicating that the jury's "request may be premature at this point," the court suggested that the jury reconsider its needs and stated that "[i]f it is your wish to have the murder charge re-read, certainly the Court can do so."

Similarly, with regard to the witnesses' testimony specified in the note, the court informed the jury that while it would be possible for the court reporter to review her notes and read the desired testimony back to the jury, this procedure would "take some time." The court suggested that "at this stage of deliberations . . . you attempt to use your own recollection of that testimony since the testimony should be fresh in your mind . . . and attempt to refresh each other's recollection." Should this attempt at recollection be unavailing, the court indicated its willingness to "accede to [the jury's] request."

The court concluded its remarks by telling the jury that "unless you advise me otherwise tomorrow morning, I will re-instruct you with regard to the charge of murder." The court then asked the jury "not to commence your deliberations before that but you can discuss amongst yourselves . . . just exactly what testimony it is that you wish and . . . whether this stands as your request or whether perhaps you want to make additions or perhaps deletions from those requests . . . tomorrow morning." Shortly thereafter, at 5:25 p.m., the jury was excused for the night.

After the jury had departed, defense counsel raised an objection to the remarks the court had made in response to the jury's request. He was troubled by the court's assumption that "obviously [the jury] have not reached a point where they are discussing any of the lesser included offenses," and objected to the court's decision to recharge only as to the offense of murder when the jury had also requested reinstruction on the three lesser included offenses and self-defense. Since it was possible that the jury, in their first hour of deliberations, had already reached a verdict of not guilty of the charged offense, he argued, it "would be prejudicial" to the defendant to recharge the jury on murder only and send it back for further deliberation. The state's attorney expressed his willingness to have the court reinstruct the jury on all the offenses in accordance with its request, and the court indicated that the defense's point was "well taken" and that he was "inclined to grant that request." The court concluded that it would "inquire again tomorrow. And if anyone, any member of the panel wants to hear the charge on the offenses certainly I will give it to them."

The following morning, October 27, 1982, the defense filed a written motion for a mistrial, alleging that the court's response to the jury's request the previous afternoon was "irreparably prejudicial to the defendant." The court conceded that "a correcting instruction or a correcting comment is necessary under the circumstances," but refused to declare a mistrial. The defendant took an exception.

When the jury entered the courtroom at 10:50 a.m., the court stated that it had received a second note from it, bearing the time notation of 9:40 a.m., which read as follows: "We are withdrawing our earlier request for testimony. Please recharge us on murder (including the definition of intent) and self defense." After reading the note into the record, the court stated that it wanted "to make some comments which I was going to make before

this note was given to me." The court then made certain curative remarks regarding his response to the jury's original request.[2]

The court proceeded to question the jury foreman about the jury's revised request. The court asked whether the second note was "prompted by the Court's comments of yesterday afternoon directly or indirectly," and the foreman responded in the affirmative. The court then instructed the jury "to ignore my comments with respect to limiting your request to the charge of murder. . . . In other words, I'm asking you to disregard my comments as to where you were in your deliberations. And I'm indicating to you that your request which was made yesterday is going to be taken care of at this time." In response to further inquiry by the court, the foreman indicated that the jury's withdrawal of its earlier request for certain testimony was also prompted by the court's remarks. Again, the court told the jury "to ignore my comments of yesterday with regard to the propriety of your requests for

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[2] The court's comments were as follows: "I should mention, first of all, that generally speaking it is not for the Court or for counsel to second guess your requests. When the jury makes a request and it is a reasonable one, that request should be ac ceded to. And I did not want to leave you with the impression — I think I might have used the words to the effect that your request might be premature. I suggested to you you should be at some point in your deliberations. I might have left that impression with you. And I want to indicate it was not my intention to suggest to you that you should be at any particular point in your deliberations at any time. We, neither Court nor counsel, can speculate as to where you are in deliberations. We do not want to know what particular point you are in your deliberations. Those are matters which concern the process of deliberation. And they are not matters that either the Court or counsel have a right to speculate about or to inquire about.

"So that you will recall we remained in session after you left yesterday. And the matter was discussed with counsel. And it was the feeling of counsel that your requests, your original requests should be acceded to. And I concur with counsels' suggestion for the reason that I felt that my comment with regard to the propriety of that request may perhaps have misled you."

either the charge or the testimony" and stated that the specified testimony would be reread.[3]

The court concluded its comments and questioning at 11:01 a.m., at which time the jury was excused from the courtroom for ten minutes. After a brief discussion between counsel and the court, during which the defendant's attorney expressed his feeling "that what has just been said to the jury now has not corrected the prejudice that was created last night," the jury was summoned at 11:11 a.m. The court then recharged the jury on all the offenses and self-defense, in accordance with its original request.

The jury's deliberations continued over the next two days, during which it requested and reheard the partial or complete testimony of six witnesses, including that of the defendant. In addition, the jury requested and received reinstruction on intent, reasonable doubt and self-defense. On October 29, 1982, at approximately 4:44 p.m., the jury announced its verdict of guilty of first degree manslaughter under General Statutes § 53a-55 (a)(1).

The defendant's sole claim on appeal is that the court erred in denying his motion for a mistrial. He argues that the court's comments of October 26, 1982, in response to the jury's initial request to be recharged on all the offenses, were irreparably prejudicial and entitle him to a new trial. We disagree. The well established rule in our state is that a

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[3] Later on October 27, 1982, at 12:06 p.m., the jury foreman, speaking on behalf of the entire panel, withdrew "our earlier request to have all the testimony read to us at this time." Because of the foreman's responses to the court's questions that morning, the court expressed concern that "the withdrawal of your request may have been prompted by something the Court might have said or implied yesterday." The foreman assured the court that "that is not the case. At the time we made the request we feel now that we were disorganized, and we are more organized now. . . . [W]e will want specific testimony re-read as we require it. . . ." After the jury was excused to continue its deliberations, counsel and the court agreed to reread testimony as the jury requested it, and this procedure was communicated to the jury.

mistrial should be granted only where it is apparent to the court that the defendant has been denied the opportunity for a fair trial due to some occurrence that took place during trial. *State v. Palmer*, 196 Conn. 157, 163, A.2d (1985); *State v. Binet*, 192 Conn. 618, 628, 473 A.2d 1200 (1984); *State v. Grayton*, 163 Conn. 104, 112, 303 A.2d 246, cert. denied, 409 U.S. 1045, 93 S. Ct. 542, 34 L. Ed. 2d 495 (1972). Under the circumstances of this case, the comments of which the defendant complains did not deprive him of a fair trial.

The defendant claims that the court's remarks were prejudicial in two respects. His primary concern is that "the jury could have understood the comments to be an intimation of the court's belief that the [d]efendant was guilty of murder." He further maintains that by focusing on the offense of murder, the court may have given the jury the impression that the crime was to be considered independently of self-defense, when in fact "the issue of whether the [d]efendant's actions were justified was an element of the State's burden of proof."

Although the defendant is certainly correct that the trial court in a criminal case must not direct or advise the jury to return a guilty verdict; General Statutes § 54-89; *State v. Taylor*, 196 Conn. 225, 232, A.2d (1985); *State v. Storlazzi*, 191 Conn. 453, 465, 464 A.2d 829 (1983); we find no such improper advice or direction in the court's remarks. The court's comments were essentially based on its original jury instruction regarding the order in which the jury should properly consider the crime charged and its lesser included offenses. The defendant did not challenge this portion of the court's charge at trial, nor does he contest its accuracy on appeal. While the court may have suggested that the jury should not yet be considering the lesser offenses, the fact that "murder" was included in the jury's initial request for reinstruction belies any suggestion that it had already reached a verdict of not guilty as to that charge.

The court's remarks were in response to a broad and extensive request for reinstruction and testimony that the jury submitted after less than one hour of deliberation. In a case that presented a total of five possible verdicts, the court was merely attempting to guide the jury as to how it should proceed in its deliberations and isolated the offense charged, murder, as the first issue for its consideration. The court's impression that such guidance was necessary is supported by the jury foreman's later assertion that "[a]t the time we made the request . . . we were disorganized. . . ." To the extent that the court's remarks focused on murder and suggested that the jury should not have progressed beyond a certain point in its deliberations, the curative instruction given the following morning served to dispel any possible confusion generated by the court's comments of the previous day. The court repeatedly told the jury to disregard its earlier comments and, absent a fair indication to the contrary, we presume that these instructions were followed. *State v. Washington*, 182 Conn. 419, 429, 438 A.2d 1144 (1980). Moreover, the jury was ultimately recharged exactly as it had requested, and the defendant concedes that these supplemental instructions were correct. Since we consider the supplemental charge together with the allegedly erroneous original comment in determining prejudicial impact; *State v. Topciu*, 183 Conn. 1, 6, 438 A.2d 803 (1981); *State v. Reed*, 174 Conn. 287, 308, 386 A.2d 243 (1978); we conclude that the defendant was not harmed by the court's remarks.

The defendant's contention that the court's offer to recharge only on murder may have misled the jury to believe that the offense should be considered separate and apart from the issue of self-defense is similarly without support in the record. The court's original charge on self-defense, which was twice repeated upon the jury's request and is not challenged by the defendant, correctly informed the jury that "the State has the burden of proving beyond a reasonable doubt that the elements of that defense as I have explained them to you are not present in this case and

that the defense is not a valid one." See General Statutes § 53a-12. Even before the court had given its curative instructions, the jury submitted a second note requesting reinstruction on "murder (including the definition of intent) and self defense." Thus, the jury clearly understood that the offense and the justification were to be considered together. Under these circumstances, we conclude that the court's comments were not misleading.

There is no error.

In this opinion the other judges concurred.

APPENDIX B

IN THE SUPERIOR COURT OF
THE STATE OF CONNECTICUT

STATE OF CONNECTICUT :

v. :

GEORGE CAVROS : NO. 46590

TRANSCRIPT

HAMMER, J. OCTOBER 26, 1982
OCTOBER 27, 1982

APPEARANCES

for Plaintiff:

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for Defendant:

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Hartford, Connecticut 06106

Gentlemen, I'm speaking now of the twelve members of the regular panel, I will excuse you at this point and I would ask you to retire with the sheriff to the deliberations room. And then, as I have indicated, you can immediately proceed to the selection of a foreman. And, as I have indicated, you will commence your deliberations as soon as the exhibits and the other paraphernalia has been sent in to you. That's all, gentlemen. You may retire.

(Whereupon, the jurors left at 3:53 p.m.)

THE COURT: Ladies and gentlemen, I want to — fortunately your services were not required in this particular case. But I do — I feel I would be remiss if I didn't extend my thanks and the thanks of counsel for your patience throughout the jury selection phase of this trial, which actually consumed more time than the trial itself, and also with regard to, as I have said, to your participation throughout the course of this trial.

At this time Mr. Roy, Mrs. Clarke, Mr. Violette, Mrs. Baker, I am going to excuse you from service in this case. And, as I say, you have our sincere gratitude and thanks for sitting through this case. We appreciate your attention and your conscientiousness and I would ask you to return downstairs and report to Mr. Short and your services are no longer required. Thank you very much.

(Whereupon, the alternate jurors were excused at 3:55 p.m.)

(Whereupon, this case reconvened at 5:14 p.m.)

THE COURT: You may be seated, gentlemen. Gentlemen, I was about to summon you. First of all, counsel stipulate that all members of this panel are present?

MR. APPLETON: Yes, your Honor.

MR. CARDWELL: Yes, your Honor.

THE COURT: I was about to summon you gentlemen to excuse you for the day when I received your note which I haven't had full opportunity to discuss with counsel. You requested, for the record I will indicate, that copy of the Court's definition of murder, manslaughter in the first degree, manslaughter in the second degree,

criminally negligent homicide and self defense. I should point out to you I will discuss this further with counsel. I should point out to you the Court's charge is delivered orally. And upon request, portions of the Court's charge may be repeated and may be re-read to you, if that necessity arises. Under our procedures the charge itself, or the statutes, the statutory basis for the charge is not before you in the jury room. But if you can make your request more specific the Court will be happy to re-read any portion of the charge that may cause you problem. Mr. Lohr, I understand you are the foreman. Is that correct?

JUROR LOHR: Yes, your Honor.

THE COURT: Would you stand, Mr. Lohr, and indicate -- is that what you were -- you were wondering -- I guess that question would seem to indicate that you actually wanted copies of the charge.

JUROR LOHR: Yes. A couple of the members of the jury made those requests.

THE COURT: I see. And I'm indicating to you, I will discuss this with counsel, but I would indicate to you that if there is a specific -- you understand, of course, that the charge explained all of these offenses in descending order. And your first function under the Court's charge is to take up the charge of murder. I think I made that clear to all of you. So, in any event, that request may be premature at this point. I'm going to suggest you think about this and report to us tomorrow. If it is your wish to have the murder charge re-read, certainly the Court can do so.

With regard to the testimony of witnesses read to you -- ordinarily, gentlemen, in the process of deliberations it consists of each of you discussing with each other your recollection of the testimony. You understand that. And it may be that this request may have arisen because there is

some differences among you as to the testimony. Is that a fair statement?

JUROR LOHR: Yes.

THE COURT: In other words, there is some differences of opinion as to — I just wondered if this is a blanket request merely because someone was not — someone's recollection wanted to be refreshed with regard to a particular witness, because the request here is for the entire testimony of Mr. Kiritsis, Mr. Liapes, Mr. Panagopolus, Mr. Karabetsos, the gentleman who was referred to as a Greek dishwasher, who I think is John Melabianakis, and John — I think that should be Richard Lusso, Richard Lusso. And, Mr. Lohr, I don't want to trespass on the secrecy of the deliberations, but this is a request made by just a few — some members of the panel, is that correct?

JUROR LOHR: I would say about fifty percent.

THE COURT: I see. If it is your — if it is the feeling — well, obviously we can't get into it today because of the lateness of the hour. I will discuss this further with counsel. And if it is your wish to have the testimony read back, that can be done. Mr. Lohr, what is the — is it necessary — can you proceed — it is going to take some time, you understand, for the reporter to check her notes and review them so that she can read this, read this testimony. Would it be fruitful, gentlemen, if you were to proceed with your deliberations while we review this tomorrow morning, or are you at an impasse?

JUROR LOHR: No, your Honor, we are not at any impasse. We can continue with our deliberations.

THE COURT: You could continue. Is it your desire to continue deliberations while I ask the reporter to, perhaps, to get this for you? Let me ask you this,

gentlemen, can you continue with the deliberations without being recharged on murder? Because I will be happy first thing tomorrow morning to give you the murder charge again. Would that be helpful to you in the course of your deliberations tomorrow?

JUROR LOHR: I think we would like to have that.

THE COURT: You would like to have the murder charge read, is that correct?

JUROR LOHR: Yes.

THE COURT: Or at least some of you would. I can certainly accede to that request. And if you gentlemen feel that you can proceed with your deliberations without the testimony, then I will — and if you still feel the same way tomorrow morning, I will arrange to have that testimony read, but it will take some time for the reporter to get that testimony and to re-read it. I think it is very important that — I realize that some of you may not recall all of the evidence, but it's very important at least at this stage of deliberations that you attempt to use your own recollection of that testimony since the testimony should be fresh in your mind, as I understand it was only within the past week, and attempt to refresh each other's recollection. And in the absence of that, of course, the Court will be happy to, if this remains your request, and you feel it is going to impede your deliberations unless all of this testimony is read, then, of course, we will accede to that request. But I can't say it will be done at ten o'clock tomorrow morning.

So what I will do tomorrow morning, gentlemen, why don't we leave it this way, what we will do tomorrow morning is, unless you advise me otherwise tomorrow morning, I will re-instruct you with regard to the charge of murder. And then when I call you in you may — when you are all assembled after you all come in tomorrow morning, I assume, as soon as you are all together, I'm going to ask

you not to commence your deliberations before that but you can discuss amongst yourselves even if the exhibits have not been brought in to you at that point just exactly what testimony it is that you wish and whether you wish — whether this stands as your request or whether perhaps you want to make additions or perhaps deletions from those requests, do you follow me, tomorrow morning. And we will plan to recharge you with regard to the offense charged in the indictment.

Now, gentlemen, I'm going to excuse you at this time because the hour is late. And I would suggest that I think it would be best for all of us if we resume tomorrow morning. You may be seated, Mr. Lohr.

As I have indicated to you, we will proceed by repeating the charge with regard to murder and then I would ask you to resume your deliberations until such time as we can have this testimony read back to you if you feel tomorrow morning that that testimony either all or parts of it should be read back. And I will ask the reporter to attempt to review that testimony.

So I'm going to excuse you at this time. I would ask you not to discuss the case at all amongst yourselves on your way out of the building or on your way into the building tomorrow and that you not — since you are deliberating at this point it's a very critical phase of the proceedings and I don't want any one of you to be disqualified for any reason at all. I would ask you not to discuss it among friends or family during this phase of the proceedings. And it's extremely important that you not acquire any independent information about the case because, as you all know, your decision in this case must rest entirely upon the evidence in the case.

As I have indicated, should your recollection need to be refreshed with regard to the evidence it is perfectly proper for you to request certain witnesses' testimony or parts

thereof if it would assist you in your deliberations. So I will hold this request in abeyance. I will indicate to you I will recharge you on the offense of murder first thing tomorrow morning. And then I would ask you to indulge us until such time as we can obtain the — or be in a position to re-read the testimony that you have requested in this case.

All right, gentlemen, that is all. You are excused. We will remain in session for just a moment.

(Whereupon, the jury was excused at 5:25 p.m.)

THE COURT: Gentlemen, I realize that I didn't discuss in advance with you how we were going to handle this problem. The thing that troubles me about it is this, that was a blanket request. I think what they — their understanding may well have been that the charge would be available to them in the jury room. I think that's a fair statement. Because obviously they have not reached a point where they are discussing any of the lesser included offenses.

MR. CARDWELL: That's not obvious to me, your Honor. And that's what troubles me.

THE COURT: Well, I have not made a definite rule on that as yet.

MR. CARDWELL: You want me to be heard now or tomorrow? I can wait until tomorrow to say what I have to say.

THE COURT: All right. Let me ask you this. You feel — I just want to get your feelings on it now so I can think on it. You think that the request should be honored in its entirety now?

MR. CARDWELL: I think you can split this request into two sections. I think you have got the one that goes to

the charge and the one that goes to the evidence. I'm not necessarily sure that you need to do the two of them together. But certainly I don't know how we can conclude that they haven't ruled out murder already. I mean, they have had an hour. And I don't know what they did in there in an hour. But it certainly made it appear that you should still be talking about murder at this time and, therefore, I'm going to charge you on the crime of murder again and send you back. I think that would be prejudicial.

THE COURT: Let me ask you something, Mr. Cardwell. Under the circumstances I can't very well ask them that question. That's the $64 question which I can't ask them as to whether they had — I can't very well inquire as to what stage of the deliberations they are in, you understand.

MR. CARDWELL: But they have asked for all the crimes. And I think if you are going to — either you are going to give them the crimes or you are not. But I think where they have asked for all of them, to say well I will give you murder again and then go back and conclude that before I give you any more —

MR. APPLETON: If I may be heard. I have no problem with having you go through all the crimes tomorrow morning at ten o'clock.

THE COURT: All right.

MR. APPLETON: And then they can have all the evidence after that. It is unfortunate they don't know the law before they start listening to evidence. Maybe this will cure any problems they have. They can have all the law first and then we can give them whatever testimony they want to go with that law. I have no problem with that. Do you agree, Mr. Caldwell?

THE COURT: I think your point is well taken, Mr. Cardwell.

MR. CARDWELL: Thank you.

THE COURT: I am inclined to grant that request. You understand what I was thinking. My initial thought was they wanted — before they started — their deliberations really got into it, they wanted to know what the law is and have it in front of them. I will tell you very frankly when you have five possible verdicts it's a perfectly natural reaction for them to hear the whole thing over again, and that may very well be what they have done, they want to hear it all again. And I will inquire again tomorrow. And if anyone, any member of the panel wants to hear the charge on the offenses certainly I will give it to them. All right. Why don't we leave it at that, gentlemen. And at this time the court will stand adjourned until tomorrow morning at ten o'clock.

(Whereupon, court adjourned at 5:29 p.m.)

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DOCKET NO. 46590 : SUPERIOR COURT

STATE OF CONNECTICUT : HARTFORD/NEW BRITAIN JD

VS. : AT HARTFORD

GEORGE CAVROS : OCTOBER 27, 1982

BEFORE: HONORABLE HARRY HAMMER

APPEARANCES:

Herbert Appleton, Esq.
Assistant State's Attorney
For the State of Connecticut

Nicholas Cardwell, Esq.
For the Defendant

Pamela J. Kraus
Court Reporter

THE COURT: Gentlemen, I will have the clerk enter a motion for mistrial made on behalf of the defendant. And that motion, as I understand it, Mr. Cardwell, is based on the fact the Court appeared to decline the jury's request that it be charged on all the lesser included offenses of criminal homicide as well as murder and feels that it was irreparably prejudicial to the defendant. That citation, Mr. Cardwell, of State vs. Lasella, is not on point. It merely has to do with protecting the defendant's interests in such a situation. Is that correct? Has to do with waiver.

MR. CARDWELL: Yes, your Honor.

THE COURT: Is that right?

MR. CARDWELL: That's correct, your Honor.

MR. APPLETON: I tried that case.

THE COURT: What's that?

MR. APPLETON: I tried that case.

THE COURT: All right. Well, then you know it does not stand for anything other than general —

MR. APPLETON: The question there was some evidence I put in in rebuttal that the claim was made that properly should have been in the case in chief and the judge exceeded his discretion in allowing me to do so.

THE COURT: And I understand, Mr. Cardwell, the citations appended to your motion or included in your motion appear to relate to instructions given by the Court. I think there is a distinction between comments and instructions, Mr. Cardwell. Wouldn't you agree that it would appear these citations have to do with instructions and sometimes it's more difficult to correct instructions than to correct comments? Would you agree, Mr. Cardwell?

MR. CARDWELL: I agree there is a difference between instructions and comments.

THE COURT: There is some degree of informality.

MR. APPLETON: Yes.

THE COURT: The Court will concede a correcting instruction or a correcting comment is necessary under the circumstances.

MR. CARDWELL: May I just very briefly just indicate that I filed this motion in writing?

THE COURT: Yes.

MR. CARDWELL: That the comments were made just before five o'clock yesterday and at ten o'clock this morning we filed this motion with a copy to the State's Attorney's Office. And it involves substantially irreparable prejudice, as the Court indicated. The Court has a copy of the motion before it. And I would just make this comment, your Honor, that it seemed to me that the jury could be left with the impression that they should still be considering murder. And what troubles me was they have had seventeen hours, even though they are not together deliberating, each of them individually could spend seventeen hours thinking about murder when they might have been thinking about the entire case and wondering what they had left out in murder. Also, by indicating you would charge them on murder and not self defense along with murder sort of separates that element from murder. And these were the things that bothered me. And I feel that this is an area that no matter what you tell the jury now the amount of hours they have had to think along this line would irreparably and substantially damage the accused or harm the accused. And that was the reason for filing this motion.

THE COURT: Of course, as I indicated in chambers, gentlemen, the hour was late and the Court did not have an opportunity, as it generally does, to discuss those matters with counsel before going on the record. The Court's assumption, and it may have been made hastily, was that since the request included the principal charge of murder it would reasonably be assumed that at least some of the members of the panel were still at that stage of their deliberations. But you are perfectly correct, Mr. Cardwell, in indicating the jury may have assumed that the Court had assumed that the members of the panel were at a particular point in their deliberations. And the Court will proceed to correct that impression if it was left and will indicate that the charge will be read in full. There are other matters I think we should discuss. The motion for mistrial is denied, but a correcting instruction will be given.

The Court also had before it a second supplemental request to charge which suggests that – and the Court has re-read it — the Court will give a charge, a correcting charge which will substantially correct any possible prejudice that you claim might result.

MR. CARDWELL: For the record, I will take an exception to the denial of the mistrial.

THE COURT: Exception may be noted.

MR. CARDWELL: Thank you, your Honor.

THE COURT: There is another question we have here, gentlemen. The request for — obviously, there will be some delay in satisfying their request with regard to testimony. I believe it's the State's feeling, Mr. Appleton, that they should suspend their deliberations until they have had the testimony re-read. Is that correct?

MR. APPLETON: Yes, your Honor. Otherwise, we will do it backward. They requested testimony. They requested the crimes. How can they deliberate without having both?

THE COURT: You recall I put the question to them. They indicated they would like to continue their deliberations. What is your feeling on that, Mr. Cardwell? Should we allow them to continue or should we indicate to them they should suspend?

MR. CARDWELL: It goes without saying whatever I say now is because I have excepted the Court's denial of the mistrial so I'm just continuing on now from that point. So taken that point, it seems to me that if the Court reads all of the charge with the comments the Court is going to make relative to them, then the jury should simply be told it will take a few minutes or a period of time and let them just decide if they want to deliberate or wait for it; but I

wouldn't get into any big discussion. It will be a period of time. Do you want to deliberate now or do you want to wait for the evidence.

MR. APPLETON: As long as they understand that their requests will be acceded to without forcing them to go into that jury room and continue deliberating in the hope of saving some time. Because as I read that —

THE COURT: You want me to put the question to them, whether they want to continue deliberations. I don't think it is appropriate, Mr. Appleton, for me to suggest to them that perhaps they shouldn't be deliberating because testimony hasn't been read back to them. I think that has to come from them rather than the Court.

MR. APPLETON: I have no objection. As long as it is put to them that it is their choice, that they can stop deliberating now if they wish to or they can deliberate or they can have the testimony read back. It's their choice, what they want to do.

THE COURT: All right. Thank you, gentlemen. Gentlemen, I think it may be academic. The reporter tells me — we talked about a matter of fifteen minutes.

MR. APPLETON: Yes.

THE COURT: All right. Sheriff, would you summon the panel, please?

(Whereupon, the jury entered the courtroom at 10:50 a.m.)

THE COURT: Gentlemen, I would ask you to remain standing. And I will ask the clerk to call the roll.

(Whereupon, the jury roll was called by the clerk.)

THE COURT: You may be seated, gentlemen. Gentlemen, I have another communication from you which I have not had an opportunity to review with counsel. It is signed by Mr. Lohr, your foreman. And I'm going to read it now for counsel since it has just been handed me by the sheriff. It reads as follows: we are withdrawing our earlier request for written testimony; please recharge us on murder including the definition of intent and self defense.

Now, gentlemen, I really should discuss this matter with counsel out of your presence. But I do want to make some comments which I was going to make before this note was given to me. And I think perhaps those comments will be appropriate in any case at this time. I wanted to correct some impression that I might have left with you yesterday. You recall the hour was late. And I made some comments with regard to the propriety of the requests that you made yesterday with regard to recharging on all of the lesser included offenses of homicide.

I should mention, first of all, that generally speaking it is not for the Court or for counsel to second guess your requests. When the jury makes a request and it is a reasonable one, that request should be acceded to. And I did not want to leave you with the impression — I think I might have used the words to the effect that your request might be premature. I suggested to you you should be at some point in your deliberations. I might have left that impression with you. And I want to indicate it was not my intention to suggest to you that you should be at any particular point in your deliberations at any time. We, neither Court nor counsel, can speculate as to where you are in deliberations. We do not want to know what particular point you are in your deliberations. Those are matters which concern the process of deliberation. And they are not matters that either the Court or counsel have a right to speculate about or to inquire about.

So that you will recall we remained in session after you left yesterday. And the matter was discussed with counsel. And it was the feeling of counsel that your requests, your original requests should be acceded to. And I concur with counsels' suggestion for the reason that I felt that my comment with regard to the propriety of that request may perhaps have misled you.

Now, what I'm indicating to you is that before receiving this note I was fully prepared to charge you on all of these offenses and to accede to your request.

Mr. Lohr, would you stand please? And I want to ask you some questions. I want to make it very clear to you, Mr. Lohr, that I don't want you to indicate directly or indirectly in any way where you are in the course of your deliberations. I would ask you this, first of all, Mr. Lohr, is this note that is with respect to being recharged on murder, was it prompted by the Court's comments of yesterday afternoon directly or indirectly, Mr. Lohr?

JUROR LOHR: Yes, your Honor.

THE COURT: All right. I'm indicating to you if it was prompted by my comments of yesterday I'm instructing you gentlemen to ignore my comments with respect to limiting your request to the charge of murder. Do you all understand that? In other words, I'm asking you to disregard my comments as to where you were in your deliberations. And I'm indicating to you that your request which was made yesterday is going to be taken care of at this time.

I will ask you a second question, Mr. Lohr. The Court made no comment, as I recall, as to the propriety or lack of propriety of the request for testimony of various witnesses. I would ask you, Mr. Lohr — and when I ask you these questions, Mr. Lohr, I don't mean — I'm not asking you the consensus of the panel. I'm asking you with

respect to what any single member of the panel's feelings are. What I am asking you is this: is your withdrawal of your earlier request for written testimony, as appears in this note, was that prompted by anything the Court said yesterday directly or indirectly?

JUROR LOHR: Yes.

THE COURT: What I'm going to indicate to you, Mr. Lohr, is this: you all understand, gentlemen, that I want you to ignore my comments of yesterday with regard to the propriety of your requests for either the charge or the testimony. It is our function, it is the Court's function, it is counsels' function to respond to your requests without, as I say, second guessing you or speculating as to where you are in your deliberations. I'm indicating to you, gentlemen, that not only am I asking you to disregard whatever comments I may have made with regard to the propriety of your requests but I'm indicating to you at this point that request is going to be honored, Mr. Lohr. In other words, what we are going to do is to — I will read the charge with regard to the principal offenses. I understand, Mr. Lohr, your note says the court definition. I'm assuming when you say that you are referring to the Court's charge in full, are you not?

JUROR LOHR: Yes.

THE COURT: So that would mean the charge with regard to the principal crime as well as the lesser offenses as well as self defense. And the Court will do that.

Now, with regard to the other request as to the testimony, that will be re-read to you. I should indicate this to you, however. It may be about fifteen minutes before we can respond to that request. I may have mentioned to you yesterday that we would read the charge to you and then you had indicated you would like to continue your deliberations. I'm mentioning the fifteen minutes, Mr. Lohr, and

gentlemen, only because I want to give you an idea of the time span that will be required. And I would leave it up to you gentlemen as to whether you want to proceed with your deliberations or you want that testimony read back. That's something that you can think about, Mr. Lohr. And if you want to discuss it with the other members of the panel at the conclusion of the Court's charge we can — you can discuss that privately in the deliberations room.

Can I ask you this, Mr. Lohr, do you have any preference with regard to the order of these matters, the testimony and the instructions? Does that make any difference to you, Mr. Lohr?

JUROR LOHR: I believe we would like the instructions first.

THE COURT: All right. That's what we will proceed to do, Mr. Lohr. And I will, as I say, with regard to — are you in a position — I don't know if you discussed this amongst yourselves this morning, but are you in a position to tell the Court in view of the fact it may take only fifteen minutes whether you would prefer to suspend deliberations until you have heard the testimony read back?

JUROR LOHR: No, we are not.

THE COURT: What's that?

JUROR LOHR: No.

THE COURT: You are not in a position to say?

JUROR LOHR: (Indicates in the negative.)

THE COURT: All right. I will give you an opportunity, Mr. Lohr, to discuss that. I will — in other words, after I re-instruct you in accordance with your request I will give you an opportunity to discuss amongst yourselves whether

you want to continue deliberations or not and report back to us. Thank you, Mr. Lohr.

JUROR LOHR: Thank you, your Honor.

THE COURT: I will ask the clerk to mark that note.

JUROR LOHR: Your Honor?

THE COURT: Yes.

JUROR LOHR: May I ask you a question?

THE COURT: Yes.

JUROR LOHR: A couple of members of the jury panel have asked if they can take notes this morning regarding the charge.

THE COURT: Well, that is not our general practice with regard to that, Mr. Lohr. Let me ask you to do this, Mr. Lohr — sheriff, would you escort the panel back to the deliberations room? And I want to discuss that request with counsel. But I want you also to discuss whether or not you want to — you wish to continue the deliberations while we are reviewing this — while the reporter is reviewing the transcript for the purpose of reading it back to you. I will ask you to do that now. So I will excuse you gentlemen and ask you to return to the deliberations room.

(Whereupon, the jury left the courtroom at 11:01 a.m.)

THE COURT: Mr. Cardwell, you will have to concede that Mr. Lohr's answers were frank and candid, weren't they?

MR. CARDWELL: They kind of suggest exactly what troubles me for the seventeen hours.

THE COURT: I think that perhaps that that may now be academic because they understand that — I think they understood the correcting instruction. The only question before us at this point, gentlemen, is this: I think it's — this request about taking notes of the charge, I think it is a perfectly natural request because naturally when there are five possible verdicts and because of the complexity of the legal definitions, I don't think it is unnatural for them to make the request. But I want you gentlemen to be heard as to if you have any comment. Mr. Appleton.

MR. APPLETON: Well, it has been my experience, not that I'm really going to comment, but the reason judges have not allowed any note taking in all the time that I have practiced —

THE COURT: That has to do with evidence. This is about the charge.

MR. APPLETON: Or a charge, or evidence, has been that they will not pay attention, that it may distract them. That's been the general position that the judges have taken.

THE COURT: What are you saying, Mr. Appleton, is that the taking of notes will distract them in the course of the giving of the charge. Mr. Cardwell, would you agree —

MR. APPLETON: If I may, they are not at liberty to stop you at any point so they can take their notes. If they could do what a judge could do on the Bench, yes.

THE COURT: This is not the only thing that troubles me.

MR. CARDWELL: What troubles me is someone may take a note down and then it begins to have more weight simply because it is in writing.

THE COURT: That's what I was about to say, Mr. Cardwell. It is not just the fact it is going to distract them. It is the fact that each one will have their own personal idea as to what the instruction is or should be. They are going to have enough trouble deliberating on the facts without having to argue about the instructions. So that I will explain to them that — in fact, I will indicate to them I will be very happy to accommodate them any way I can to this extent, I will indicate to them that if at any point they want any of these, any specific charge read back, I will do that. Okay.

MR. APPLETON: I think you just indicated they can raise their hand.

THE COURT: No. No. I'm saying that after —

MR. APPLETON: Afterward —

THE COURT: After I read all the charges. I will indicate to them that if they want —

MR. APPLETON: I understand.

THE COURT: That would be logical, because don't forget they are supposedly taking one offense at a time. They have requested — that's one of the reasons, by the way, that the Court mentioned yesterday about only murder, because there is a great possibility that they are going to ask for the charge for one of the lesser included charges even after I read all of them to them. Do you follow me? So that I will state to them that I'm reading the lesser included offenses but that at any point if they have any question about any of those offenses they can come back and ask for a recharge.

MR. APPLETON: I think we ought to be a little more careful, if your Honor doesn't mind. Let's not — I don't think that they should be — anything specific should

be said to them about it. You are going to read the complete charge. If at any time they want anything further you will do so, period. Not suggesting anything to them.

THE COURT: All right. I think, gentlemen, we are agreed then we will explain to them note taking — I will explain the reasons. I will indicate the distraction aspect of it and the fact that note taking may serve to — may serve only to confuse them with regard to the instructions.

MR. CARDWELL: May I be heard on something?

THE COURT: Yes.

MR. CARDWELL: Just to protect the record, I feel that what has just been said to the jury now has not corrected the prejudice that was created last night. And I just want the record to be clear that in my opinion that we have not corrected or cured the situation. And I would like that to be on the record.

THE COURT: Because your primary position is that the error — it was not corrected, which is why you moved for a mistrial. Is that correct?

MR. CARDWELL: That's correct. And that nothing I have heard has changed that. If anything, it has supported my view, and because they have come in here now zeroed in on the very thing the Court suggested they should be thinking about.

THE COURT: I understand —

MR. CARDWELL: And they have had the seventeen hours. Plus one other thing. It is apparent that they have had some kind of discussion and deliberation in spite of the instruction at five o'clock.

THE COURT: Well, no. I think that I had indicated to them that they were to consider their requests only. Isn't that correct? That was not an invitation to deliberate, was it? I believe I indicated to them that they should consider —

MR. CARDWELL: They have clearly had some kind of discussion. So will that be noted for the record?

THE COURT: Yes, it may be noted for the record. In other words, you are not abandoning your motion for mistrial and you feel that the colloquy between counsel and the foreman supports the ground stated in your motion?

MR. CARDWELL: You mean the Court and the foreman.

THE COURT: The Court and the foreman.

MR. CARDWELL: Yes.

THE COURT: All right. Sheriff, would you —

MR. APPLETON: Before we summon the panel shouldn't we wait and see if they have concluded what your Honor instructed them to do about what they want?

THE COURT: I assume they have at this point.

MR. CARDWELL: May I have just thirty seconds?

(Whereupon, the jury entered the courtroom at 11:11 a.m.)

THE COURT: Gentlemen, you may be seated. Will counsel stipulate that all members of the panel are present?

MR. APPLETON: Yes, your Honor.

MR. CARDWELL: Yes, your Honor.

JUROR LOHR: Your Honor, may I ask you a question?

THE COURT: Mr. Lohr.

JUROR LOHR: We are in agreement at the present time that we can continue our deliberations, and without the testimony as we originally requested.

THE COURT: Mr. Lohr, what we will do then is this, as soon as we are prepared to read the testimony of all the witnesses that were requested in accordance with your note we will inform you and bring you back in the courtroom.

JUROR LOHR: Thank you, your Honor.

THE COURT: Thank you. Gentlemen, in accordance with your request of yesterday the Court will now proceed to re-read to you in accordance with your request the Court's definition, which I assume on the basis of my colloquy with Mr. Lohr means the Court's full charge on murder, manslaughter first degree, manslaughter second degree, criminally negligent homicide as well as self defense. And the Court will re-read it exactly as was read to you initially in that order.

There was a request through Mr. Lohr for — there had been a request from some of you with regard to taking notes as to the charge. Let me indicate to you, gentlemen, we cannot accede to that request. The reason for not allowing note taking is this: I don't know if I had mentioned this to you earlier. The reason we don't allow note taking in the course of the evidence is that we feel it would be distracting for you. In the taking of the evidence, the taking down of testimony you would miss some of the evidence, some of the testimony. Under our law the jury's function requires

them to be attentive at all times to the testimony of the witness on the stand at that particular time. There is a further reason about note taking in the course of the trial. And that is that if notes are taken it may be that some part of the evidence may be unduly highlighted by some of you and the comparing of notes might cause more confusion than enlightenment as opposed to the exchanging of views as to your recollection of the evidence.

I would indicate to you that the same reasons apply in the case of the Court's charge; namely, that the taking — in the course of taking of notes — I realize these things are difficult enough for lay persons such as yourselves to understand, but in the course of taking notes, you see, you might miss something very important. And similarly, if you took notes and you compared your notes you might — perhaps some of you might attach a greater importance to a particular point than others of you. So that what I'm saying to you is I'm explaining to you the reasons we cannot accede to that request.

But I want you to understand this, gentlemen, it is always appropriate for the members of the panel at any point to request whatever evidence they feel they need to be read back to them. And it is also appropriate for them to have re-read to them any portion of the charge. So what I'm indicating to you is this: that even though the Court is going to read to you its entire charge on this case including the lesser included offenses that does not preclude any of you from requesting that any part of that charge be re-read. Is that clear, gentlemen?

I don't want any of you to think merely because I'm reading my charge completely with regard to the issues that you requested that you are precluded either from asking for any one of them again or asking for any other portion of the charge. We are here to accommodate you gentlemen and to assist you in your deliberations in arriving at a verdict. We are not here to hinder you in that

respect. I want you to understand any reasonable request that you make will be honored whether pertaining to evidence or whether it pertains to the charge.

So now I will proceed to respond to your request. And, as I said, I will read it exactly as it was read to you initially, in the same order that it was read to you initially, without any changes or modifications. And I will begin immediately, if you recall, gentlemen, immediately after the reading of the indictment to you I made some general comments about homicide. And I will proceed with my reading of the charge at that particular point, that is, at the point where the indictment was read to you and the significance of the indictment was explained to you.

Supreme Court, U.S.
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No. 85-313

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

GEORGE CAVROS,
Petitioner,
v.
STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

Did the court's comment to the jury in which the petitioner contends the court intimated its belief in the petitioner's guilt and suggested that the jury should be at a certain stage in its deliberations deprive the petitioner of due process?

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STATEMENT OF THE CASE

Following a trial to a jury of twelve, the petitioner was convicted of manslaughter in the first degree in violation of Connecticut General Statutes § 53a-55(a)(1) and sentenced to a term of not less than ten nor more than twenty years imprisonment. Thereafter, the petitioner appealed to the Connecticut Supreme Court. The court unanimously affirmed his conviction on June 25, 1985, State v. Cavros, 196 Conn 519, 494 A.2d 550 (1985).

On appeal, the petitioner alleged that the trial court erred in denying his motion for mistrial based on certain allegedly prejudicial remarks made by the court to the jury. Id., 196 Conn. at 520; Appendix to Petition for Certiorari at 1A-2A. (Hereinafter Appendix). The circumstances under which the remarks were made, the remarks themselves, the arguments of counsel at trial, the court's curative instructions, and subsequent events relevant to the claim

are fully discussed in the opinion below and do not warrant extensive reiteration. See id., 196 Conn. at 522-26; Appendix at 3A-7A. Basically, the petitioner claimed that in the course of responding to a request by the jury the trial court intimated its belief that the petitioner was guilty of murder and suggested that the jury divorce the consideration of self defense from consideration of the substantive charge. The request which prompted the challenged remarks was made shortly after the jury retired to deliberate. The jury requested a copy of the court's charge on murder, self defense, and all the lesser included offenses, as well as the testimony of six major witnesses. The court responded by explaining that the jury would not be receiving written copies of the charge. The court then repeated its earlier instruction "that the charge explained all of the offenses in descending order ... [y]our first function under the Court's charge is

to take up the charge of murder. Id., 196 Conn. at 522; Appendix at 4A. The court indicated that the jury's request "may be premature at this point," suggested that the jury reconsider its needs, and concluded by saying "unless you advise me otherwise tomorrow morning, I will reinstruct you with regard to the charge of murder." Id.

The Connecticut Supreme Court rejected the petitioner's claim that these remarks were irreparably prejudicial and should have entitled him to a mistrial. Id., 196 Conn. at 526; Appendix at 8A. Reasoning that the trial court was merely attempting to guide the jury as to the order in which it should consider the crime charged and its lesser included offenses, the Connecticut Supreme Court held that the court did not improperly direct or advise the jury to return a guilty verdict. Id. 196 Conn. at 527; Appendix at 8A. To the extent that the trial court's comments may have suggested that the jury should be at a certain point in its deliber-

ations, the court found the curative instructions directing the jury to disregard such an implication sufficient to dispel any confusion. Id., 196 Conn. at 528; Appendix at 9A.

Finally, the court found the petitioner's claim that the initial comments may have induced the jury to divorce the consideration of self defense from that of the substantive offenses without merit. Because the jury asked to be recharged on self defense and murder even before the court's curative instruction, it was evident that the jury clearly understood that the offense and the justification were to be considered together. Id., 196 Conn. at 528-29; Appendix at 9A-10A.

REASONS FOR DENIAL OF THE WRIT

A. The Issue Presented Herein is Unique, Fact-Bound, and Not Worthy of This Court's Attention

As the Connecticut Supreme Court opinion makes clear, resolution of petitioner's claim is highly dependent on its factual context, the import of the challenged comments, and the effect of the court's curative instruction. The claim advanced by the petitioner is unique, involving as it does extemporaneous comments by a court in response to a jury request. Therefore, the precise situation presented herein is unlikely to reoccur, rendering a decision on this issue of little precedential value.

Other cases in which a court's comments are challenged as being overly intrusive into the deliberative process will be decided, as was this case, on the basis of the particular facts presented. Because this Court does not grant certiorari to

review evidence and discuss specific facts, United States v. Johnston, 268 U.S. 220, 227 (1925) (Holmes, J.) and because the present issue is deeply embedded in its factual context, it is not worthy of this Court's attention.

B. The Decision Below Does Not Conflict With Controlling Precedent

The only justification offered by petitioner for focusing this Court's scarce resources on this issue is that the Connecticut Supreme Court decided a constitutional question in conflict with controlling precedent. Petition for Certiorari at 7. The state disagrees and contends that this case presents no more that a state law question concerning the propriety of a court's comment to the jury and the denial of a motion of mistrial.

This Court has long held that a trial judge may make fair comment on the evidence.

See e.g. Quercia v. United States, 289 U.S. 466, 469-70 (1932). An actual undue intrusion into the province of the jury requires much more uncured prejudice than that which this record reveals. Cf. e.g. Quercia v. United States, 289 U.S. 466 (1933). (Error for Court to instruct jury that wiping one's hands as the defendant did was almost always an indication of lying, and that everything the defendant said, except when he agreed with the government's testimony, was false); United States v. United States Gypsum Co., 438 U.S. 422 (1978). (ex parte communication between judge and jury foreman during the course of deliberations which may have have left jury with the impression that it must return a verdict held erroneous); United States v. De LaBarra, 447 F.2d 193 (5th cir. 1971); (Court's comment that the defendant had presented no defense entitling him to an acquittal required reversal); United States v. Dunmore, 446 F.2d 1214 (8th Cir. 1971)

cert. denied, 404 U.S. 1041 (1972); (Where government's case hinged almost entirely on accomplice's testimony, trial court's endorsement of accomplice's credibility was tantamount to a directed verdict.)

As the Connecticut Supreme Court correctly noted, the court's comments were not overly intrusive; they merely reiterated earlier instructions on the order in which the jury should consider the five possible verdicts. Furthermore, the record demonstrates that the court's comments did not cause the jury to divorce self defense from its consideration of the substantive offenses. Any possible confusion caused by the comments was removed by the court's emphatic curative instructions.

Therefore, the decision below is unremarkable and does not conflict with controlling precedent.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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